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DISTRICT COURT, BOULDER COUNTY, COLORADO

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PLAINTIFFS: COLORADO OIL & GAS ASSOCIATION; and COLORADO OIL & GAS CONSERVATION COMMISSION;

PLAINTIFF-INTERVENOR: TOP OPERATING, CO.

v.

DEFENDANT: CITY OF LONGMONT, COLORADO;

DEFENDANT-INTERVENORS: OUR HEALTH, OUR FUTURE, OUR LONGMONT; SIERRA CLUB; FOOD & WATER WATCH; and EARTHWORKS.

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Case Number: 2013CV63

Div. 3

COLORADO OIL & GAS ASSOCIATION'S COMBINED REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Pursuant to C.R.C.P. 56(c), the Colorado Oil & Gas Association ("**COGA**") submits its Combined Reply ("**Reply**") to the Responses of the City of Longmont ("**City**" or "**Longmont**") and the Citizen-Intervenors ("**Intervenors**") in Support of Its Motion for Summary Judgment ("**Motion**" or "**Summary Judgment Brief**"), and respectfully requests the Court invalidate as preempted article XVI of the City of Longmont's Land Use Code ("**Charter Amendment**" or "**Bans**") in its entirety.

I. INTRODUCTION

Cities in Colorado do not have the authority to ban hydraulic fracturing because the state has a significant, and even dominant, interest in the efficient production of oil and gas, and in furtherance of that interest the state has chosen to allow and regulate the practice. The state's interest has been confirmed as a matter of law by the Colorado Supreme Court in *Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1061 (Colo. 1992)—which determined the nature and extent of the state's interest by analyzing the Colorado Oil and Gas Conservation Act, COLO. REV. STAT. §§ 34-60-101, *et seq.* ("**Conservation Act**") without a fully developed factual record. The *Voss* court held that "[t]here is ***no question*** that the Oil and Gas Conservation Act evidences a significant interest on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources in a manner calculated 'to prevent waste and to protect the correlative rights of common-source owners and producers to a fair share of the production profits.'" *Voss*, 830 P.2d at 1065–66 (emphasis added) (quoting *Bd. of Cnty. Comm'rs of La Plata Cnty. v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1058 (Colo. 1992)). As the *Voss* court held, the state's interest is sufficiently dominant to preempt a ban on the drilling of oil and gas wells. *Id.* at 1068.

Voss mandates a similar result here. The City did not directly ban oil and gas drilling, as Greeley had done in *Voss*, but it did ban the use of hydraulic fracturing—the customary and standard well-completion technique used on nearly all newly completed wells in the Wattenberg field in the last 40 years. Whether or not it is theoretically possible, as the Defendants have argued, that a well could be drilled in the City that would produce oil or gas without the use of hydraulic fracturing, that possibility is hardly sufficient to distinguish the City's ban from the ban in Greeley that was overturned in *Voss*. Moreover, regardless of this theoretical possibility, the relevant question here is whether the state has the authority and has chosen to regulate hydraulic fracturing activity. If the Court finds that it does and has, then the City's Bans are preempted by the Conservation Act.

Notwithstanding the clear pronouncements in *Voss* regarding the state's dominant interest, the Defendants argue that the City's Bans are merely land-use regulations that fall within the City's home-rule authority. But total bans on activities within a city are not typical land-use regulations—they are fundamentally different. While home-rule municipalities may regulate land use within their borders, they may not do so in a manner that negates the state's interest entirely, as does a total ban on an activity permitted by the state pursuant to a state interest. It has long been the law in Colorado that local laws regulating an area of dominant state interest or in areas of mixed local and state concern cannot conflict with state law, and are therefore preempted when they altogether forbid what the state allows. Defendants largely ignore COGA's detailed analysis of this conflict test, which has been used consistently by Colorado courts from at least 1941 and as recently as last year in *Webb v. City of Black Hawk*, 2013 CO 9,

295 P.3d 480 (Colo. 2013), to address whether laws passed by home-rule municipalities are preempted by state law.

Defendants' only direct responses are to argue (1) that the Bans do not prohibit what the state allows or regulates because the state has never given an operator a permit specifically targeted to authorize it to hydraulically fracture a well, and (2) that the state's rules governing hydraulic fracturing are not strong or comprehensive enough to qualify as preemptive regulations. Neither argument has merit. First, there is no dispute that the state has allowed hydraulic fracturing to occur in Colorado for more than four decades, and the Colorado Oil & Gas Conservation Commission ("**Commission**" or "**COGCC**") has approved permits to drill, complete, and produce oil and gas wells in Colorado since that time.[1] And while the state does not issue separate permits for the completion stage of drilling a well, it certainly regulates the practice. Numerous COGCC rules ("**Rules**") apply to the practice regardless of whether they specifically contain the words "hydraulic fracturing," many of which were discussed at length in COGA's Summary Judgment Brief. COGA's Summ. J. Br. at 19–22.

Second, Plaintiffs' argument regarding the supposed weakness of the COGCC's rules on hydraulic fracturing rests on the misconception that COGA's position would preclude any local regulation of hydraulic fracturing, when in fact, COGA has argued—consistently with *Voss*—only that municipalities may not ban it altogether. Moreover, the City's argument is fatally compromised by its decision to largely ignore the *Webb* preemption test that has been consistently used by Colorado courts for over seventy years under which Colorado courts have consistently reject local regulations that forbid what the state allows in areas of dominant state or

[1] COGA's Summ. J. Br. Ex. 1 at 9; City's Response Br. Ex. 25 at 220.

mixed state and local concern. The issue is not, as the City claims, whether the state's rules governing hydraulic fracturing are strong or comprehensive enough to qualify as preemptive regulations, but whether the City's Bans conflicts with state regulations regulating hydraulic fracturing operations.

Voss and *Webb* remain the law in Colorado and mandate that the City's Bans are preempted by the Conservation Act and the Commission's rules. COGA therefore requests the Court grant the relief requested in its Motion.

II. PROPER STANDARD OF REVIEW

A. SUMMARY JUDGMENT IS APPROPRIATE WHEN MATERIAL FACTS ARE NOT IN DISPUTE.

Summary judgment is appropriate when there is no dispute of facts material to the rendering of judgment. *See, e.g., W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002) "[T]he existence of a difficult or complicated question of law, when there is no issue as to the facts, is not a bar to summary judgment." *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981). Even where facts are hotly disputed, summary judgment is appropriate where the disputed facts are not material to the court's determination. *KN Energy, Inc. v. Great W. Sugar Co.*, 698 P.2d 769, 778 (Colo. 1985) (affirming grant of summary judgment over dispute of fact because fact was not material). Where, as here, the *material* facts are undisputed, the issues for summary judgment are pure questions of law. *See Frontier Exploration, Inc. v. Blocker Exploration Co.*, 709 P.2d 39, 41 (Colo. App. 1985). Because the City has identified no *material* facts that are in dispute, as discussed in detail herein, there is no barrier to this Court's determination of the critical legal issue—whether the Charter Amendment is preempted—or to its issuing of summary judgment in COGA's favor.

B. THE EVIDENTIARY STANDARDS CITED BY THE DEFENDANTS ARE INAPPLICABLE IN PREEMPTION ANALYSIS.

1. It is the City, not COGA, that has a heightened burden of proof.

The City argues that "a municipal charter amendment is generally presumed to be valid and the challenging party has the burden of proving it invalid *beyond a reasonable doubt*." City's Response Br. at 36 (emphasis added); Intervenors' Response Br. at 15. No Colorado case has ever applied the City's proposed "beyond a reasonable doubt" standard to resolve state preemption issues.[2] Rather, the "beyond a reasonable doubt" standard applies only to *constitutional* review of otherwise validly enacted statutes and ordinances and not to preemption analysis. *See, e.g., Trinen v. City & Cnty. of Denver*, 53 P.3d 754, 758–60 (Colo. App. 2002) (applying "beyond a reasonable doubt" standard to constitutional review, but not in preemption analysis); *Lot Thirty-Four Venture, L.L.C. v. Town of Telluride ("Telluride I")*, 976 P.2d 303, 307 (Colo. App. 1998) (same), *aff'd*, 3 P.3d 30 (Colo. 2000) *("Telluride II")*; *U.S. W. Commc'ns, Inc. v. City of Longmont*, 924 P.2d 1071, 1079–80 & 1084 (Colo. App. 1995) (same), *aff'd*, 948 P.2d 509 (Colo. 1997); *Cherokee Water & Sanitation Dist. v. El Paso Cnty.*, 770 P.2d 1339, 1341–42 (Colo. App. 1988) (same).

[2] COGA has located only one unpublished case that purported to apply the "beyond a reasonable doubt" standard in the preemption context. *See McCarville v. City of Colorado Springs*, 2013 COA 169 ¶ 16. That case, however, resolved the preemption issue as a matter of pure statutory analysis, without reference to any facts other than the texts of the relevant statutes, ordinances, and provisions of the City Code. Strangely, the City cites *Sellon v. City of Manitou Springs*, 745 P.2d 229, 232 (Colo. 1987), for the proposition that government enactments of any sort are presumed valid and a party challenging them on any grounds must prove their invalidity "beyond a reasonable doubt." *See* City Response Br. at 37. But *Sellon* did not involve a preemption claim, and explicitly limited the "beyond a reasonable doubt" standard to constitutional challenges. *Id.* ("Thus, a party challenging a zoning ordinance *on constitutional grounds* assumes the burden of proving the asserted invalidity beyond a reasonable doubt.") (emphasis added).

The reason that this heightened standard does not apply in preemption cases is because the "purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government." *Colo. Min. Ass'n v. Bd. of Cnty. Comm'rs of Summit Cnty.*, 199 P.3d 718, 723 (Colo. 2009) (citing *Bd. of Cnty. Comm'rs of La Plata Cnty. v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1055 (Colo. 1992)). Under the City's proposed standard, the outcome of a court's preemption analysis would depend entirely on which party brought the declaratory claim because the state statutes and regulations under which a local regulation might be preempted must *also* be presumed to be valid.

In this case, COGA is entitled to a presumption that the Conservation Act and the COGCC's regulations adopted pursuant to the Conservation Act are valid at least to the same extent the Charter Amendment is presumed valid. The only issue before the Court is the legal question of whether state law preempts the Charter Amendment. That determination does not depend on proof of any fact beyond a reasonable doubt.

In fact, the heightened burden falls on the City and the Intervenors, not COGA, because the City's Charter Amendment bans the use of all land within the City for particular activities. Local regulations which ban an activity altogether, such as the City's outright ban on hydraulic fracturing, are subject to "heightened scrutiny in preemption analysis." *Colo. Min. Ass'n*, 199 P.3d at 725. "Courts examine with *particular* scrutiny those zoning ordinances that ban certain land uses or activities instead of delineating appropriate areas for those uses or activities." *Id.* at 730 (emphasis added). These pronouncements in *Colorado Mining Ass'n* were made in the specific context of a preemption challenge to a local land-use regulation, as discussed in detail below. *See infra* § III.D.

Courts routinely recognize the distinction between regulation or restriction of an activity and its total prohibition, finding the former to be within a city's authority while the latter is not. In fact, the Colorado Supreme Court has repeatedly held that "the power to regulate does not include 'any power, express or inherent, to prohibit.'" *Combined Commc'ns Corp. v. City & Cnty. of Denver*, 542 P.2d 79, 82–83 (Colo. 1975) (quoting *Gen. Outdoor Advert. Co. v. Goodman*, 262 P.2d 261 (Colo. 1953)); *cf. Colo. Min. Ass'n*, 199 P.3d at 731 ("Though counties have broad land use planning authority, that authority does not generally include the right to ban disfavored uses from *all* zoning districts.") (emphasis in original, citing *Combined Commc'ns*). Instead, "local land use authority is typically exercised by designating appropriate areas for different land uses and placing conditions on those uses." *Colo. Min. Ass'n*, 199 P.3d at 731. In *Combined Communications Corp.*, for example, the Court found that Denver lacked authority to prohibit billboards throughout the city, even though regulation of signage was well within its land-use authority. *Combined Commc'ns*, 542 P.2d at 82–83.

The Colorado Supreme Court has also explicitly relied on this distinction in finding a local ordinance preempted by state law. *Givigliano v. Veltri*, 501 P.2d 1044, 1046 (Colo. 1972) ("[T]he Trinidad ordinance in question here does not seek to impose police or licensing regulations upon the collection of trash. Instead, it attempts to supercede the exercise of the constitutional and statutory authority granted to the Commission, and to abrogate its action.") (ordinance banning private trash collection preempted). Courts elsewhere recognize the same principle:

> The constitutionality of zoning ordinances which totally prohibit legitimate businesses such as quarrying from an entire community should be regarded with particular circumspection; for unlike the constitutionality of most restrictions on property rights imposed by

> other ordinances, the constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community.

Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp., 228 A.2d 169, 179 (Pa. 1967). The City's Bans are not ordinary land-use regulations; they are prohibitions, and as such are subject to heightened scrutiny.

2. The Court need only evaluate one set of circumstances: the City's imposition of a ban on all hydraulic fracturing of oil and gas wells and the storage and disposal of related waste.

The Intervenors also assert that COGA must prove that "'no set of circumstances' exists in which the regulation can be applied in a permissible manner." Intervenors' Response Br. at 15–16 (emphasis removed). But COGA need only show either that the Charter Amendment is impliedly preempted or, in the event the Court determines that the regulation of oil and gas completion operations involving hydraulic fracturing is a matter of mixed state and local concern, that the Charter Amendment conflicts with the Commission's regulations authorizing and allowing oil and gas well completion via hydraulic fracturing. The Intervenors' distinction between facial and "as applied" challenges, and the corresponding assertion that COGA must prove that "no set of circumstances exists under which the ban would be valid," is inapplicable in the context of the City's outright ban on oil and gas completion through hydraulic fracturing, which necessarily places only one "possible set of conditions" on hydraulic fracturing operations in the City: <u>it forbids hydraulic fracturing entirely</u>.

Colorado cases have rarely applied a "no set of circumstances" test in the preemption context, because it generally applies only to constitutional challenges to regulations that do not

impose total bans on activity.[3] Courts that have considered the test in the oil and gas context have done so only in evaluating the preemption of specific permitting requirements. For example, in *Board of County Commissioners of Gunnison County v. BDS International, LLC*, also cited by Intervenors (Response Brief at 14–15), the court held that where a party challenging specific permitting regulations has not applied for a permit, the court must interpret the permitting requirements to harmonize with state law if possible under any particular set of circumstances. 159 P.3d 773, 779 (Colo. App. 2006). Here, COGA does not challenge permitting requirements. Rather, COGA is seeking to render the City's ban on hydraulic fracturing entirely inoperative. Nor can the Charter Amendment be "harmonized" with state regulations because, as discussed in more detail below, it prohibits and negates what the state allows. *See infra* § III.B.2.

III. ARGUMENT

A. THE FACTS ALLEGED BY THE CITY AND INTERVENORS ARE IMMATERIAL AND IRRELEVANT, AND NO FURTHER FACTS ARE NEEDED TO GRANT COGA'S MOTION.

1. *Voss* is binding precedent and its key legal holdings do not depend on any of the factual matters raised by the Defendants.

The *Voss* court determined, as a matter of law, that the state has a dominant interest in specific aspects of oil and gas development and operations. *Voss*, 830 P.2d at 1065–66. In fact, the court stated that "[t]here is ***no question*** that the Oil and Gas Conservation Act evidences a significant interest on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources in a manner calculated 'to prevent waste and to protect the correlative rights of common-source owners and producers to a fair share of the production

[3] The Intervenors cite to *Sanger v. Dennis*, 148 P.3d 404, 410–11 (Colo. App. 2006) in support of the "no set of circumstances test," Response Brief at 15, yet *Sanger* is inapposite because it was not a preemption case. Sanger involved an "as applied" constitutional challenge to the validity of an administrative rule under the First and Fourteenth Amendment right of association.

profits.'" *Id.* (emphasis added) (quoting *Bowen/Edwards*, 830 P.2d at 1058). That determination, based solely on statutory construction of the Conservation Act, is binding precedent for this Court.

Voss further held that "[t]here is ***no question*** that the efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration." *Id.* at 1068 (emphasis added) (quoting *Bowen/Edwards*, 830 P.2d at 1058). Again, this determination did not hinge on the facts of that case—rather, it was imported wholesale from *Bowen/Edwards*, a contrasting case that was decided without any factual record at all.

Finally, the plain holding in *Voss* was not limited to Greeley and did not depend on the particular circumstances in Greeley, the number of wells in the city, the residency of any oil and gas employees, or the city's economic relationship to the state (*cf.* City's Response Br. at 74); rather, it applied to *any* home-rule city and was based on the "statewide" interests evidenced by the state regulatory regime. *Voss*, 830 P.2d at 1062 ("[w]e hold that . . . the statewide interest in the efficient development and production of oil and gas resources . . . prevents a home-rule city from exercising its land-use authority so as to totally ban the drilling of oil, gas, or hydrocarbon wells within the city."). In sum, none of the key holdings in *Voss* hinged on any particular facts beyond the legislative intent the court gleaned from the Conservation Act.

Nevertheless, the Defendants seek to place numerous factual issues before the Court under a veiled suggestion that the *Voss* court simply got it wrong.[4] As an initial matter, several of the exhibits on which the City relies to distinguish *Voss* are inadmissible and may not be considered on summary judgment. In particular, the City attaches numerous unauthenticated exhibits to its Response Brief, including Exhibits 15–19, 21–23, 25, 27–29, 32 Exs. A & B, 33, 34, 37, 39–42, 44 Ex. 2 & 3, & 45–50. These exhibits are inadmissible under C.R.E. 901 and cannot be considered on summary judgment because evidence must be admissible to create a cognizable dispute of fact. *See, e.g., Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612, 617 (Colo. App. 2003) ("Authentication of a document is a condition precedent to its admissibility" and evidence must be admissible to create dispute of fact for summary judgment); *Schultz v. Wells*, 13 P.3d 846, 852 (Colo. App. 2000) (affirming grant of summary judgment in face of factual dispute based on inadmissible evidence).

Further, the facts the City marshals to avoid summary judgment are irrelevant and immaterial to the preemption issue COGA raised in its Motion. To begin with, the City's Bans are not materially different than the ban on drilling considered in *Voss* because they ban entirely an omnipresent well-completion technique that is subject to regulation by the state. Just like the ban on drilling considered in *Voss* (which similarly did not ban all oil and gas activity within the city, but merely the drilling of *new* wells), the City's Bans altogether prohibit anywhere within the City a significant oil and gas practice that the state has allowed and regulated for more than

[4] The City subtly invites the Court to "overrule" *Voss* on the basis of "changing conditions." *See* City's Response Br. at 63, fn.16. The authority to do so rests solely with the Colorado Supreme Court. *See, e.g., People v. Novotny*, 2014 CO 18 ¶ 26, 320 P.3d 1194, 1203 (Colo. 2014) ("we alone can overrule our prior precedents concerning matters of state law"), *reh'g denied* (Apr. 7, 2014); C.A.R. 35(f) ("Those opinions designated for official publication shall be followed as precedent by the trial judges of the state of Colorado.").

40 years pursuant to the Conservation Act. Accordingly, *Voss* is binding precedent that requires the City's Bans to be invalidated.

Defendants seek to distinguish *Voss* by arguing that (1) that there is no longer a need for statewide uniformity in oil and gas development and production as there was at the time of the Court's decision in *Voss*; (2) there are no extraterritorial impacts of the Bans; and (3) the state never regulated the use, storage, and disposal of hydraulic fracturing fluids so there was no conflict when it banned the use of hydraulic fracturing in the City. City's Response Br. at 64–73. As noted above, *Voss* forecloses the first two of these arguments as a matter of law. The third is simply untrue.

Here, the COGCC has argued that the Conservation Act authorizes it to regulate hydraulic fracturing and the storage and disposal of related wastes, and that its Rules do, in fact, regulate these practices. *See* COGCC's Summ. J. Br. at 4–5; *see also* COGA's Summ. J. Br. at 19–22. In construing statutes and regulations, the court should afford the agency tasked with carrying out its mandate deference in its interpretation thereof. *Stell v. Boulder County Dept. of Social Servs.*, 92 P.3d 910, 915–16 (Colo. 2004). Further, the Commission's decision not to prohibit hydraulic fracturing of wells since the 1970s (*see* COGA's Summary Judgment Brief Ex. 1 at 9) carries as much interpretive weight as would a decision to regulate the practice in the manner apparently desired by Defendants. *See Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983).

In addition, while the City bases the need to "distinguish" *Voss* on its authority to regulate land-use issues for the protection of its citizens' health, safety and welfare, City Response Br. at 85–86, that authority has been vested in the COGCC with regard to oil and gas

operations. *See* COLO. REV. STAT. § 34-60-106(2)(d) ("The commission has the authority to regulate: . . . [o]il and gas operations so as to prevent and mitigate significant adverse environmental impacts . . . to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources . . . ."); § 34-60-106(11)(a)(II) (commission must promulgate rules to "to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations."); *see also* Phillip D. Barber, *Colorado Oil and Gas Conservation Commission Regulations and Conflicts Over Location of Oil and Gas Operations*, *in* 1B COLO. PRAC., METHODS OF PRACTICE § 14:9 (6th ed. 2014) ("The Conservation Commission has also established 'safety regulations' that protect the health, safety, and welfare of the general public during the drilling, *completion*, and operation of oil and gas wells and producing facilities.") (emphasis added).

The advances in horizontal drilling, on which the City relies (City's Response Br. at 69 & 71–73), also do not merit departure from *Voss*. The City argues that these advances decrease the need for uniformity, but this claim ignores the obvious facts that the (1) the Charter Amendment is not limited in application to horizontal wells, and (2) the Charter Amendment bans hydraulically fracturing a wellbore that runs through the City, whether the wellhead is initially drilled in the City or outside the City, such that oil and gas resources in Longmont cannot be retrieved through the use of horizontal wells that need to be hydraulically fractured. Further, the Commission retains "the express authority to divide a pool of oil or gas into drilling units and to limit the production from a pool so as to prevent waste and to protect the correlative rights of owners and producers in the common source or pool to a fair and equitable share of production profits. [C.R.S.] §§ 34-60-116 & -117, ..." *Voss*, 830 P.2d at 1067. The advent of horizontal

drilling did nothing to erase the Commission's express statutory authority on which the *Voss* court relied.

Finally, in Colorado there are ninety-seven home-rule municipalities, one hundred and seventy one statutory municipalities and sixty statutory counties. Regardless of the advent of horizontal drilling, allowing individual communities to disregard *Voss* and ban hydraulic fracturing in oil and gas production would create the same "patchwork" of regulations which the Supreme Court has admonished against in matters where there is a state interest. *See Colo. Min. Ass'n*, 199 P.3d at 731 ("[a] patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources.").

This Court should therefore reject the City's invitation to "distinguish" *Voss*.

2. An *ad hoc* evidentiary hearing is not required.

Both defendants incorrectly argue that the Court is required as a matter of law to hold an *ad hoc* evidentiary hearing to determine whether an operational conflict exists because it is a "fact intensive determination." They further argue that since a hearing has not occurred in this case, summary judgment is premature. City's Response Br. at 62, 83–84; Intervenors' Response Br. at 25–27. In so arguing, both defendants incorrectly rely upon the suggestion in *Bowen/Edwards* that determination of whether an operational conflict exists must be decided on a "fully developed factual record." City's Response Br. at 83 (citing *Bowen/Edwards*, 830 P.2d at 1060); Intevenors' Response Br. at 25 (same). Nothing in the *Bowen/Edwards* case purports to require an *ad hoc* evidentiary hearing, or even a fully developed factual record, in every preemption matter. Rather, such a record is required only where the court cannot determine

whether a specific challenged regulation operationally conflicts with state law as a matter of statutory construction. In cases where the municipality bans what the state allows, as here, no evidentiary record is required.

In fact, the trial court, the Court of Appeals, and the Colorado Supreme Court in *Bowen/Edwards* all decided preemption issues without *any* factual record. The appellate proceedings arose after the district court granted the County's motion to dismiss on standing grounds, holding that, "There is not yet a controversy in this case upon which to base a factual record, and the case is not ripe for review." 830 P.2d at 1051–52. The trial court later denied a motion to amend its judgment, but nevertheless addressed the preemption issue. *Id.* at 1052. On appeal, the Court of Appeals held that the regulations were preempted because it found that the Conservation Act vested sole oil and gas regulatory authority with the COGCC. *Id.* The Colorado Supreme Court then reversed the Court of Appeals, and in doing so examined whether the County's regulations were legitimate exercises of its land-use authority. *Id.* at 1055–56. *All* of these rulings were made without any factual record at all. The Colorado Supreme Court only determined that an *ad hoc* evidentiary hearing was required under the facts of that case because the complaint alleged express preemption of the entirety of the County's regulations and did not allege that any specific sections of the regulations were preempted through an operational conflict. *Id.* at 1059–60. The court remanded the case to the district court so that Bowen/Edwards could amend its complaint to specify the particular regulations it was challenging as preempted. *Id.* at 1060 ("[u]pon remand of the case to the district court, Bowen/Edwards should be afforded the opportunity to specify by appropriate pleading those particular county regulations which it

claims are operationally in conflict with, and thus preempted by, the state statutory or regulatory scheme . . . .").

Other Colorado courts have followed the *Bowen/Edwards* model and have ruled on preemption claims when possible without first requiring development of a factual record. For example, the *Voss* court declared a Greeley ordinance banning oil and gas drilling preempted, despite the fact that no factual record had been developed. *Voss*, 830 P.2d at 1063 n.2 (noting that "no such [factual] record is before us in this case"). If the City is correct that the *Voss* holding represents a finding of operational conflict (City's Response Br. at 62), then *Voss* itself makes clear that no evidentiary hearing is required to perform an operational conflict analysis where the ordinance at issue completely bans an activity in which the state has an interest.[5] In *Board of County Commissioners of County of Logan v. Vandemoer*, the court specifically noted that "no fully developed record [is] needed for an operational conflict analysis if on [the] existing record the issue can be decided on its face" and decided that the "total prohibition" against moving agricultural sprinklers on county roads—a clear land-use enactment—operationally conflicted with state statute, based solely on evaluation of the statutory terms and the state policy evinced by the statutory regime. 205 P.3d 423, 428–29 (Colo. App. 2008) (citing *BDS Int'l*, 159 P.3d at 779).

Here, Plaintiffs have specifically alleged in their complaints that the City's Bans are preempted as a matter of law because they prohibit and negate what the state allows and

[5] COGA does not believe that the City's position is correct. The Colorado Supreme Court has explained that the *Voss* holding was based on a finding of implied preemption. *See Colo. Min. Ass'n*, 199 P.3d at 724; *see also infra* § III.D. There is ***no question*** that implied preemption may be determined through statutory analysis without an evidentiary hearing or fully developed factual record.

regulates. *See* COGA's First Am. Compl. ¶ 23. No evidentiary hearing is required because the Court can determine the preemption question on the basis of the texts of the governing statutes and regulations, as well as the legal holdings in *Voss* and numerous other cases.

B. THE CHARTER AMENDMENT IS NOT A VALID EXERCISE OF THE POWERS GRANTED TO HOME-RULE MUNICIPALITIES AND IS SUBJECT TO PREEMPTION.

1. The prohibition of hydraulic fracturing in oil and gas operations is not a matter of purely local concern.

The City's Response Brief hinges first on the City's claim that the regulation of hydraulic fracturing in oil and gas operations is a purely local concern that home-rule governments may regulate without fear of preemption by conflicting state law. This position is somewhat ironic in light of the City's admission that it did not include the hydraulic fracturing bans in Ordinance O-2012-5 because the City recognized that it has "no authority to stop fracking of oil and gas wells permitted by the state . . . ." COGA's Summ. J. Br. Ex. 4 (emphasis added). And while the City repeatedly asserts this argument in its Response, it never seriously grapples with the overwhelming legal precedent set forth in COGA's Summary Judgment Brief demonstrating that the state has a substantial interest in the regulation of oil and gas in Colorado, which includes the use, storage, and disposal of hydraulic fracturing fluids, and that this area is at a minimum a matter of mixed state and local concern subject to state preemption. COGA's Summ. J. Br. at 9–14.[6]

[6] Surprisingly, the Intervenors argue that COGA's complaint does not challenge the validity of the Charter Amendment's ban on the storage and disposal of fracturing-related waste. Intervenors' Response Br. at 42-44. Intervenors are simply wrong. COGA's First Amended Complaint specifically seeks a declaration that the entire Charter Amendment is invalid. *See* COGA's First Am. Compl. ¶¶ 43; *id.* at 1 (COGA seeks "a declaratory judgment invalidating Article XVI of the City of Longmont's . . . Home Rule Charter") & 9 ("Prayer For Relief") (requesting declaration that "Article XVI . . . is preempted . . . ."). COGA separately noted that

COGA quoted extensively from *Voss* and *Bowen/Edwards* to demonstrate that Colorado courts have consistently recognized the substantial state interest in oil and gas regulation. As COGA pointed out, no Colorado court has ever held that the regulation of oil and gas is a matter of purely local concern. *Id*. at 9. Tellingly, Defendants have identified *no* case holding that, as a matter of law, land-use regulations by their nature implicate *purely* local concerns or that they are otherwise exempt from traditional preemption analysis. *None* of the Colorado cases cited by the City or Intervenors involved a ban on activities of state interest or upheld a ban in the face of conflicting state laws.

Consistent with the analysis in *Voss*, COGA also cited extensively in its Summary Judgment Brief to the Conservation Act to demonstrate the substantial interest the state has in ensuring the production of oil and gas at maximum efficient rates of production and to minimize waste of the state's natural resources. *See* COGA's Summ. J. Br. at 7. In addition, COGA provided a detailed review of the Commission's comprehensive regulations pertaining to hydraulic fracturing of oil and gas operations under authority expressly delegated by the Colorado legislature. These regulations authorize oil and gas well completion via hydraulic fracturing, which is prohibited by the Charter Amendment. *Id.* at 18–22.

Against this precedent, the Defendants argue that: (1) the Charter Amendment is insulated from preemption analysis by the Home Rule Amendment (City Response Br. at 58); (2) hydraulic fracturing and the "boom" spawned by horizontal wells in the Wattenberg Field create

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the Charter Amendment impermissibly prohibits storage and disposal of hydraulic fracturing wastes. *Id.* ¶ 23(b). COGA further noted that the COGCC has adopted regulations "in connection with the management of E&P waste" that would preempt the Charter Amendment. *Id.* ¶ 42. COGA's complaint fairly sets forth a claim that the City's bans on storage and disposal are preempted.

health, safety and welfare issues that render the regulation of hydraulic fracturing a matter of purely local concern; (3) amendments to the Conservation Act secured and preserved local authority to regulate oil and gas operations; and (4) that cases from other states demonstrate that hydraulic fracturing is a matter of purely local concern. None of these arguments is persuasive.

First, the Home Rule Amendment confers no authority on the City to ban oil and gas development and production or to otherwise regulate in areas where the state has an interest. To the contrary, it explicitly limits plenary home-rule authority to "local and municipal" matters—which defines the reach of the state's ability to preempt local laws. Colo. Const. art. XX, § 6. As the City itself admits, home-rule municipalities have plenary authority only "over issues *solely* of local concern . . . ." City's Response Br. at 58 (emphasis added) (quoting *Webb*, 2013 CO 9 ¶ 17).

Second, the Defendants' health and safety concerns do not render hydraulic fracturing a matter of purely local concern. As noted above, *supra* § III.A.1, the COGCC has been granted authority to regulate to prevent and mitigate environmental impacts to protect public health, safety, and welfare. COLO. REV. STAT. § 34-60-106(2)(d). This authority reflects the state's substantial interest in regulation of oil and gas operations, including hydraulic fracturing.

Third, while amendments to the Conservation Act did preserve local authority to regulate (City's Response Br. at 63 & n.17 ("nothing in this act shall establish, alter, impair, or negate the authority of local governments to regulate land use related to oil and gas operations")), these amendments also did not expand local land-use authority. The amendments explicitly did not "establish" or "alter" whatever authority local governments already had to regulate oil and gas

operations. Instead, they clarified that local authority has *always* been limited in the regulation of oil and gas operations to protect health, safety, and welfare.[7]

Finally, the City's reliance on cases from other states, including *Anschutz Exploration Corp. v. Town of Dryden*, is misplaced. City's Response Br. at 67 & n.9 (citing *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 473 (N.Y. Sup. Ct. 2012), *aff'd sub nom. Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714 (N.Y. App. Div. 2013), *leave to appeal granted*, 995 N.E.2d 851 (N.Y. 2013) and other cases). As the *Anschutz* court itself observed, Colorado law regarding preemption in the oil and gas context is simply different from New York law. *Anschutz*, 964 N.Y.S.2d at 469 (observing that *Voss* and *Bowen/Edwards* held that a zoning ordinance banning oil and gas drilling would be preempted under Colorado law, but noting that the New York Court of Appeals "has held otherwise . . . .").

In Colorado, unlike New York, a home-rule municipality's police and zoning powers are limited to its local and municipal affairs and are subject to preemption in matters of state or mixed concern. *See, e.g., City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 755 (Colo. 2001) ("[j]ust as with other powers of municipalities, however, a home rule city's police powers are supreme only in matters of purely local concern."); *Nat'l Advert. v. Dept. of Hwy's*, 751 P.2d 632, 634–35 (Colo. 1988) (recognizing that control of land use through zoning is a matter of local concern, acknowledging that regulation of signage is a valid exercise of zoning power, and

[7] In 2007, when those provisions were adopted, the legal landscape included *Voss*, *Bowen/Edwards*, *Town of Frederick*, and *BDS*, which allowed local governments to regulate certain typical land-use aspects of oil and gas operations while reserving to the State the regulation of "technical" areas of drilling, operations and environmental protection. *See* COGA's Summ. J. Br. at 9–15. With particular regard to matters addressed in the 2007 amendments, which included wildlife habitat stewardship and the reasonable accommodation of surface owners, the legislation provision cited by the City made clear that it was not increasing the extent to which local governments could regulate oil and gas under applicable case law.

nevertheless denying that control of outdoor advertising signs is a matter of *purely* local concern). The *National Advertising* Court explicitly rejected the City's arguments that the exercise of land-use authority implicates only local concerns.

The other out-of-state cases the City cites (Response Br. at 67, fn. 20) do not help the City either, as each state court similarly reaches a conclusion that is contrary to the Colorado Supreme Court's decision in *Voss* that local governments may not ban all oil and gas development and production. In addition, resort to other states' discussions regarding their Conservation Acts is futile. "At common law there was, of course, no Commission; the Commission is a creature of statute, and its authority and power is limited by the statute. It is the particular statute under consideration which leads us to the conclusion here announced, and reference to dissimilar Acts prevailing in other jurisdictions is futile." *Union Pac. R.R. Co. v. Oil and Gas Conservation Comm'n*, 284 P.2d 242, 247 (Colo. 1955) (en banc).

In sum, the City's argument seeks to turn the preemption doctrine on its head. A home-rule city's plenary authority to enact land-use regulations, along with its police power, must yield to conflicting state regulations in all other matters that are not deemed to be purely local, including the regulation of oil and gas development and production which includes the hydraulic fracturing of wells. *See, e.g., Qwest Corp.*, 18 P.3d at 755 ("Just as with other powers of municipalities, however, a home-rule city's police powers are supreme only in matters of purely local concern.").

2. In matters of mixed state and local concern, local regulations that conflict with state law are preempted.

The City at length attempts to negate a central argument in COGA's summary judgment motion—that the City's Charter Amendment is preempted because it prohibits what is authorized

by the state. *See* COGA's Summ. J. Br. at 18–22. Colorado's courts have consistently held that if a local regulation involves mixed state and local concerns, a home-rule regulation may "exist with a state regulation only so long as there is no conflict; if there is a conflict, the state statute supersedes the conflicting local regulation." *Webb*, 295 P.3d at 486; *Voss*, 830 P.2d at 1066. In such matters of mixed concern, as the City admits (Response Br. at 51), the *relevant* test to determine whether home-rule legislation conflicts with state law "is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 493 (*citing Commerce City*, 40 P.3d at 1284); *City of Northglenn v. Ibarra*, 62 P.3d 151, 165 (Colo. 2003).

Specifically, Colorado courts have routinely determined that a home-rule municipality's ordinance is preempted by conflicting state statutes or regulations,[8] despite the municipality echoing time and again the City's same argument, that the local ordinance is not preempted under state law because of its broad land-use and local authority or police power:

- *Ryals v. City of Englewood*, 962 F. Supp. 2d 1236, 1249 (D. Colo. 2013). Court holds that regulation of sex offender residency is a matter of mixed state and local concern and therefore the city's effective ban on all felony sex offenders living within its boundaries is preempted by conflicting state law.

- *Webb*, 295 P.3d at 492. Court finds that city ordinance prohibiting bicycles traveling from outside the municipality on streets within municipality regulated in an area of mixed state and local law, and therefore was preempted by state law allowing home-rule cities to prohibit bicycles only if an alternative route is established.

[8] The City argues, without legal support, that only statutes may preempt a local ordinance and preemption analysis does not apply to an agency's regulations. Response Br. at 51. This is an incorrect statement of the law of preemption. *Voss*, 830 P.2d at 1066 (". . .while in a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city.") (emphasis added); *BDS*, 159 P.3d at 779 ("in determining whether the County Regulations are in operational conflict with the state statute or regulation, . . .") (emphasis added).

- *City of Northglenn v. Ibarra*, 62 P.3d 151, 163 (Colo. 2003). Home-rule city's ordinance prohibiting unrelated or unmarried registered sex offenders from living together in a single-family residence was preempted by conflicting state law.

- *City of Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002). Statutes governing automated vehicle identification systems preempted conflicting provisions of home-rule ordinances because issue was a matter of mixed state and local law in which both cities and the state have important interests at stake.

- *City & County of Denver v. Qwest*, 18 P.3d at 748, 754 (Colo. 2001). Court holds statute preempts Denver's ordinance granting telecommunications providers a right to occupy public rights-of-way without additional authorization, despite Denver's argument that issue was within its land-use authority as a home-rule city.

- *Telluride II*, 3 P.3d at 37. Rent control for private residential property was held to be a matter of mixed local and statewide concern, and statute prohibiting municipalities from enacting rent control preempted home-rule town's "affordable housing mitigation" ordinance imposing rent control.

- *Voss*, 830 P.2d at 1068. Court holds that City of Greeley's ban on oil and gas activity was preempted under the state's "sufficiently dominant" interest in oil and gas regulation, despite City's argument that it had broad land-use authority to regulate oil and gas under its home-rule authority and the LUCEA.

- *National Advertising*, 751 P.2d at 635. Court holds that control of outdoor advertising signs within home-rule municipality is a matter of mixed state and local concern, and state Outdoor Advertising Act therefore preempted a conflicting city regulation.

- *Denver & Rio Grande W.R.R. V. City and County of Denver*, 673 P.2d 354, 361 n.11 (Colo. 1983). Court compares city's interest in construction of certain viaducts with the "paramount" interest of those living outside of Denver and holds that the construction of the viaducts was of mixed local and state concern and state statute preempted conflicting city charter provision.

- *Huff v. Mayor of Colorado Springs*, 512 P.2d 632, 634 (Colo. 1973). Court determines that matter of firefighters' pensions is one of statewide interest and concern and preempts a local government's conflicting provision.

- *People v. Graham*, 110 P.2d 256, 257 (Colo. 1941). Local government ordinance regulating traffic was preempted by statute because "[a]s motor vehicle traffic in the

> state and between home-rule municipalities becomes more and more integrated it gradually ceases to be a 'local' matter and becomes subject to general law."[9]

In every one of these decisions, the court first determined whether the subject matter of the home-rule government's ordinance was of statewide concern, of mixed state and local concern, or of purely local concern. After considering whether the particular state interest existed and then comparing it with the home-rule municipality's land-use and police powers, the courts determined that the subject matter was at least a matter of mixed local and state concern. The courts then employed the exact conflict test employed in *Webb*—"whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes"—to hold that state law preempted the local ordinance. *Webb*, 295 P.3d at 492.

Perhaps recognizing the weight of this precedent, the Defendants primarily rely on the argument that the Bans do not prohibit what the state permits because the state does not regulate the hydraulic fracturing of wells. City Response Br. at 43–53; Intervenors' Response Br. at 36. The City first argues that Colo. Rev. Stat. § 34-60-106(2)(b) does not provide authority to the COGCC to regulate hydraulic fracturing of oil and gas wells because hydraulic fracturing is not "shooting" or a "chemical treatment." City's Response Br. at 43–45. In particular, the City states

[9] By contrast to these decisions, courts have on occasion in preemption analysis deemed a matter to be a purely local concern and held that the home-rule government's ordinance was not preempted. But in each of these decisions, the court reached this holding only after concluding that the state had very little or no interest in the area subject to the local government regulation. For example, in *City and County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990), the Court held that a state statute forbidding municipalities from adopting residency requirements for municipal employees unconstitutionally interfered with the power of home-rule municipalities to determine conditions of employment for their employees because the Colorado Constitution grants home-rule cities the right to regulate the right of municipal employees. *See also Coopersmith v. City & County of Denver*, 399 P.2d 943, 947 (Colo. 1965) (Denver as home-rule city has control over tenure and retirement of employees because issue is a purely local matter in which the state has minimal interest).

that since Plaintiff's definition of hydraulic fracturing does not require the use of chemicals, this statutory section cannot authorize regulation of hydraulic fracturing, and "[a]t best chemicals are a minor component of the [fracking] process." *Id.* However, the City omits reference to the statutory authority cited by the Court in *Voss*, §§ 34-60-116–117, which grants express authority to the Commission to divide pools of oil and gas and prevent waste and protect correlative rights. 830 P.2d at 1067. Further, the Commission's hydraulic fracturing definitions clearly encompass the fact that chemicals are used in hydraulic fracturing. *See* Rules 100 Series, definitions of Chemical(s), Chemical Disclosure Registry, Chemical Family, Hydraulic Fracturing Additive, Hydraulic Fracturing Fluid, and Hydraulic Fracturing Treatment; *see also* COGA's Summ. J. Br., Ex. 1.

At any rate, the COGCC has authority to regulate hydraulic fracturing regardless of whether it qualifies as "shooting" or "chemical treatment." *See Oborne v. Bd. of Cnty. Comm'rs of Douglas Cnty.*, 764 P.2d 397, 402 (Colo. App. 1988) ("[t]his amendment also granted the Commission the additional authority to promulgate regulations 'to protect the health, safety, and welfare of the general public in the drilling, *completion*, and operation of oil and gas wells and production facilities.'") (emphasis added) (quoting former § 34–60–106(11)). Section 34-60-106(11)(a)(II) has since been amended to authorize the COGCC "to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations." This clearly still encompasses the authority to regulate well completion. COGA understands that the COGCC will address its authority to regulate hydraulic fracturing in more depth in its reply brief. In an effort to avoid redundancy, COGA incorporates the COGCC's arguments regarding its statutory authority as if set forth herein.

Next, the City argues that because the COGCC (1) does not issue a permit expressly to hydraulically fracture a well; (2) does not state what chemicals and how much fluid may be used to complete the well; and (3) does not give permission for the number of fracturing stages in the wellbore, this amounts to the "non-regulation" of hydraulic fracturing. Response Br. at 46, 50-51. But the City fails to look at the totality of the Rules which cover all well completions specifically including hydraulical fracturing and its impacts to the public and environmental health, safety & welfare. *See* Rules 205 (access to chemical inventory records), 205A (hydraulic fracturing chemical disclosure), 305.e (permit approval may include conditions to protect legitimate health, safety & welfare concerns), 317B (public water protection system includes during "completion"), 318.A.e(4) (GWA groundwater sampling), 609 (statewide groundwater sampling), 906 (spills and releases), and 908 (centralized E&P waste management facilities).

More specifically, the COGCC issues a permit to drill and complete each well. Rule 303 (requiring permit "for the drilling or re-entry of any well" as well as for any "request to deepen, re-enter, recomplete to a different reservoir, or to drill a sidetrack of an existing well"). This covers the completion of the well, no matter by what method, hydraulic fracturing or otherwise. In addition, notice of drilling and completion are required to be given to surface owners which includes the COGCC Information Brochure (COGA's Summ. J. Br., Ex. 2) per Rule 305.f along with surface owner consultation. Rule 306.a. Building owner notification is also required and includes notice of "drilling and completion activities. . ." Rule 306.e. A permit to drill will not be issued by the COGCC until the operator certifies compliance with these 306.e meeting requirements. Rule 306.e.(5). Because each of these Rules applies to every well using hydraulic fracturing, there is no logical reason to require a separate hydraulic fracturing permit.

Further, during the drilling and completion stage, the Commission regulates operations to prevent possible blowouts by imposing specific requirements on the technical design of wells, Rules 317 & 327, and requiring operators to test their well casings in advance to verify that they can withstand the pressures that will be applied during well completion or re-completion, including hydraulic fracturing. Rule 317.j, 317.o, 317.p & 326.

The Rules also mandate that operators design wells so that hydraulic fracturing fluids are confined to the target formations and to monitor and record pressures continuously during hydraulic fracturing operations to ensure that fracturing fluids are confined and that well bore integrity is maintained. Rule 341(Bradenhead monitoring during well stimulation). Within thirty (30) days after completing a well or re-stimulating the formation, operators must file a completed or re-completed interval report (Form 5A) that summarizes the fracturing treatment. Rule 308(B); *see also* Rule 316A which confirms that 308(B) applies to hydraulic fracturing fluids.

Rules 325 and 326 regulate the underground disposal of water and fluids including hydraulic fracturing fluids and set forth the mechanical integrity requirements for those underground disposal wells. Rule 907 regulates the proper disposal of E&P waste, which includes hydraulic fracturing fluids. COLO. REV. STAT. § 34-60-103(4.5); Rule 100 Series further defines exploration and production waste. Rule 907.e governs the disposal of oily waste including "frac sand." Lastly, Rules 903 and 904 cover permitting and reporting for pits and pit liner requirements including for hydraulic fracturing fluids.

Here, the Court should defer to the Commission's interpretation of its regulations and the Conservation Act, which allows, authorizes, and regulates operators in the completion and re-completion of oil and gas wells through the use of hydraulically fracturing fluids and techniques,

as well as the storage and disposal of those fluids. *Stell,* 92 P.3d at 915–16. The City's argument that its Bans do not negate the exact activity is semantic nonsense. The Conservation Act and Rules specifically sanction and regulate the use, storage, and disposal of hydraulic fracturing fluids.

3. The claimed safety, nuisance, and environmental impacts of oil and gas operations do not make the negation of hydraulic fracturing a purely local matter.

The Defendants' Responses deal mainly with alleged safety, nuisance, and environmental impacts of oil and gas operations, claiming that these potential impacts make oil and gas development and production, including hydraulic fracturing, a purely local matter subject only to local government regulation. City's Response Br. at 12–24, 74–79 & Exs. 10–14, 19, 21–23, 25, 32 & 38; Intervenors' Response Br. at 28–37 & Exs A, C & D. But these potential oil and gas development health and environmental impacts do not somehow transform the Bans into a purely local concern or empower the City to ban hydraulic fracturing outright.

The state's substantial interest in oil and gas regulation has already been established as a matter of law in *Voss* and other Colorado decisions, as discussed above and in detail in COGA's Summary Judgment Brief. *Voss*, 830 P.2d at 1065 & 1068–69; *Bowen/Edwards*, 830 P.2d at 1057–58; and *Town of Frederick*, 60 P.3d at 761. Here, the City's recitation of alleged impacts of oil and gas operations brought on by the ability to drill long horizontal wells in the Wattenberg Field does not override the state's significant interest.

The Court's decision in *Colorado Mining Ass'n* provides further support of the State's significant interest in oil and gas regulation. 199 P.3d at 723. While the City tries to distinguish

the case, City's Response Br. at 40–41,[10] that case is directly relevant to whether environmental and public health concerns render oil and gas completions to extract oil and gas reserves a purely local matter. There, Summit County banned the use of cyanide or other toxic or acidic reagents in heap or vat leach mining, which were techniques "customarily used" to extract gold, because the County had determined that those activities posed "unacceptable environmental and public health risks." *Id.* at 722 (emphasis added). The Court nonetheless relied upon the state regulatory regime adopted by the Mined Land Reclamation Act to authorize and regulate toxic or acidic chemicals, and the Mined Land Reclamation Board's role in protecting the environment, in finding that the ban was preempted by the state's sufficiently dominant interest in regulating the use of chemicals in mining operations. *Id.* at 722, 726–728 & 733–34. The Court explicitly relied upon *Bowen/Edwards* and *Voss* to find the County's ban was impliedly preempted by the overriding state interest:

> We recognize common themes in *Bowen/Edwards* and *Voss*: (1) the state has a significant interest in both mineral development and in human health and environmental protection, and (2) the exercise of local land use authority complements the exercise of state authority but cannot negate a more specifically drawn statutory provision the General Assembly has enacted.

Id. at 730.

The City's insistence that safety, nuisance, and environmental concerns have transformed oil and gas operations involving hydraulic fracturing fluids into a local matter is particularly

[10] The City argues that *Colorado Mining Ass'n* is distinguishable because in that case, the legislature granted the state "*sole* authority" to regulate the challenged activity. City's Response Br. at 40. But the court did not rest its preemption holding solely on that provision—rather, it engaged in the sort of analysis COGA urges here, and found that the ordinance was preempted because it "bans an activity the state statute authorizes. We do not have before us in this case a county land use ordinance that can be harmonized with the MLRA." *Id.* at 734.

ironic in light of its admission that the Conservation Act § 34-60-102(1) acknowledges that the "state interest now includes public health, safety, and welfare." City's Response Br. at 85–86. Moreover, as detailed in COGA's Summary Judgment Brief and above, extensive state regulations of oil and gas drilling, completion, production, and abandonment comprehensively regulate the very safety, nuisance, and environmental aspects of oil and gas drilling which the City addresses. *See* COGA's Summ. J. Br. at 18–22 & Ex. 1 (setting forth the Commission's 2011 regulations regarding hydraulic fracturing treatment fluid reporting, setbacks from occupied buildings, protection of wildlife habitat and species and public water supplies, and noise and aesthetic impacts of oil and gas operations).

Indeed, as a result of community concerns regarding the health, safety and welfare issues surrounding "the unprecedented increase in the permitting and production of oil and gas in Colorado in the past few years," the COGCC in 2008 substantially added and amended the Rules. COGCC, "Statement of Basis, Specific Statutory Authority, and Purpose" at 1, *available at* http://cogcc.state.co.us/RuleMaking/FinalRules/COGCCFinalSPB_121708.pdf (last visited June 23, 2014). In January 2013, the COGCC promulgated statewide water sampling and monitoring Rules (new Rule 609 and amended Rule 318A.e.(4)) to "protect the health, safety, and welfare, including the environment and wildlife resources, from the impacts resulting from oil and gas development in Colorado." COGCC, "Statement of Basis, Specific Statutory Authority, and Purpose" at 1, *available at* http://cogcc.state.co.us/RR_HF2012/Groundwater/FinalRules/StatementofBasisPurpose_Rule609_FINAL_012513.pdf (last visited June 23, 2014). In February 2013 the COGCC adopted new "Setback Rules" to "protect the health, safety, and welfare, including the environment and wildlife resources, from the impacts

resulting from oil and gas development in Colorado, including spills, odors, noise, dust, and lighting." COGCC, "Statement of Basis, Specific Statutory Authority, and Purpose" at 1, *available at* http://cogcc.state.co.us/RR_HF2012/setbacks/FinalRules/Final_SetbackRules-StatementOfBasisAndPurpose.pdf (last visited June 23, 2014); *see also* Phillip D. Barber, *Spacing Under the Colorado Oil and Gas Conservation Act*, *in* 1B COLO. PRAC., METHODS OF PRACTICE § 14:6 (6th ed. 2014) ("On February 11, 2013, the [COGCC] approved new setback rules, modifying the COGCC rules in the 300 series (Drilling, Development, Production, and Abandonment), 600 series (Safety Regulations), 800 series (Aesthetic and Noise Control Regulations), and corresponding portions of the 100 Series definitions. The new rules, effective August 1, 2013, concern location requirements for Oil and Gas Facilities, mitigation and notice requirements, and related matters.").

Other state agencies have also acted to protect the health, safety, and welfare of Colorado residents. In February 2014, the Colorado Department of Public Health and Environment ("**CDPHE**") adopted Air Quality Control Commission ("**AQCC"**) Regulation No. 7, which regulates hydrocarbon emissions from oil and gas operations on a state-only, state-wide basis. 5 CCR 1001-9. As a further example, in response to local hysteria in Garfield County that oil and gas operations caused fetal birth defects (City's Response Br., Ex. 21), the CDPHE conducted an epidemiological study in April 2014, "Glenwood Springs Prenatal Report," which found no link to oil and gas drilling in Garfield County and fetal problems. CDPHE, "Glenwood Springs Prenatal Report" at 10, *available at* http://www.colorado.gov/cs/Satellite/CDPHE-Main/CBON/1251583470000 (under "Hot Topics" section, click on "Glenwood Springs Prenatal

Report") ("Overall, we found no predominant risk factor that was common among the majority of women. . . . The majority of the cohort did not live near an active oil and gas well . . . .").

The City readily admits that the mandate of the Conservation Act tasks the Commission with balancing the extraction of the natural resources of the state with the health, safety and welfare of the public and the protection of the environment and the states wildlife. City's Response Br. at 85–86; *see* §§ 34-60-102(1), 105–107 & 116–117. The state has continued to fulfill its Legislative mandate on a statewide basis and has extensively revised the COGCC and AQCC Rules to protect public health, safety, welfare, and environmental interests since the increased oil and gas activity started in Colorado around 2008. The state's continuing balancing of oil and gas interests with health, safety and welfare undermines the City's position that it should be the sole arbiter to ban hydraulic fracturing of wells in the City due to its health, safety and welfare concerns.

4. The Charter Amendment undermines statewide uniformity of oil and gas regulation.

In *Bowen/Edwards*, the court held that "There is no question that the efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration." *Bowen/Edwards*, 830 P.2d at 1058. This statement was not explicitly premised on an evaluation of any particular facts or circumstances, but appears to have been regarded as self-evident. The *Voss* court expressly adopted this conclusion as applicable to home-rule cities. *Voss*, 830 P.2d at 1068. Nevertheless, the City argues that *Voss* relied on the conclusion that a ban would create waste and impact correlative rights of mineral

owners in a "common source or pool" in finding a need for uniform regulation, and that neither of those considerations apply to the City's Bans. City's Response Br. at 68–71.

First, the City argues that "modern unconventional reservoirs" like those in Longmont do not constitute the sort of "pools" of oil and gas that were considered by the *Voss* court. *Id*. at 68–69. However, a 'pool" is defined in the Conservation Act as "an underground reservoir containing a common accumulation of oil or gas, or both. Each zone of a general structure, which zone is completely separated from any other zone in the structure, is covered by the word 'pool' as used in this article." COLO. REV. STAT. § 34-60-103(9). The scope of the Rules apply to "all pools and fields . . . ." Rule 201. The formations underlying Longmont, even under the City's description, constitute "pools" within the meaning of the Conservation Act.

Second, the City argues that the Commission has adopted different Rules for several different basins such that the need for statewide uniformity is diminished. Response Br. at 67. However, the different field rules, like Rule 318A covering the GWA, are required for geological reasons and the Rules specifically mandate that "the specific field rules shall govern to the extent of any conflict." Rule 201; *see also Union Pac. R.R.*, 294 P.2d at 243–44 (explaining how the Weber Sand in the Rangely Field produces oil). The fact that the Commission has different field rules covering different geological formations in the state supports the need for statewide uniformity of regulation by the Commission rather than detracts from the need for statewide uniformity because the geological formations that are separately addressed by the field rules do not conform to political boundaries. *See Voss*, 830 P.2d. at 1067 (uniformity required because boundaries of subterranean pools "do not conform to any jurisdictional pattern"); *see also, e.g.*, Phillip D. Barber, *The Origins of Oil and Gas Conservation Statutes*, *in* 1B Colo. Prac., Methods

Of Practice § 14:3 (6th ed. 2014) (conservation statutes arose because "[i]t was apparent that property boundary lines bore no relationship to the extent or outline of oil and gas formations.") (apparently quoting from a primer of the practices of the COGCC prepared by Lucius Woods).

It is undisputed that Synergy recently drilled two wellbores that underlie both Longmont and Firestone. Synergy was not able to hydraulically fracture the portions of the wellbores that underlie Longmont due to the Bans. **Ex. 10**, Dep. of Edward Holloway (excerpt), at 60:16–20 & 74:22–75:20. Synergy hydraulically fractured the portions of the wellbores that underlie Frederick as authorized by the Commission. *Id*. This not only reveals the extraterritorial impact of the Bans (*see infra* § 5), but supports the need for uniformity because the inability of Synergy to fracture the wellbore under Longmont resulted in waste and an "abuse of correlative rights," which is prohibited by the Conservation Act. C.R.S. § 34-60-102(13)(c); **Ex. 10**, Holloway Dep. at 60:1–61:24.

Third, the City argues that because oil and gas left in the ground may be produced at a later time with the advent of some hypothetical and speculative future technology, the Bans do not create waste, which was impermissible under *Voss*. City's Response Br. at 70–71. The Legislative Declaration (COLO. REV. STAT. § 34-60-102(1)), the definitions of waste (§ 34-60-102(11)–(13)), the general waste prohibition (§ 34-60-107), and Rule 201 together prohibit this type of waste. A reasonable and prudent operator is required to produce oil and gas in economic quantities and protect the correlative rights of mineral owners. *Davis v. Cramer*, 808 P.2d 358, 360–361 (Colo. 1991).

Fourth, as mentioned above, in Colorado there are ninety-seven home-rule municipalities, one hundred and seventy one statutory municipalities and sixty statutory counties. To allow

individual communities to ban hydraulic fracturing in oil and gas production would create the same "patchwork" of regulations which the Supreme Court has admonished against in matters where there is a state interest. *See Colo. Min. Ass'n*, 199 P.3d at 731 ("[a] patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources."). To the same degree as Greeley's ban in *Voss* and Summit County's ban in *Colorado Mining Ass'n*, those same statewide goals are undermined by the Charter Amendment here. *See also Ryals*, 962 F.Supp.2d at 1247 ("a uniform approach to residency requirements [for registered sex offenders] would avoid a 'patchwork approach' to the reintegration of sex offenders into society"); *City of Commerce City*, 40 P.3d at 1282 (need unifying state legislation to avoid "patchwork of rules and procedures by individual cities" for automated vehicle identification systems); *Webb*, 295 P.3d at 492 ("[t]he state's interests include consistent application of statewide laws to avoid patchwork bicycle regulation . . . .").

Thus, the Defendant's claims that insignificant oil and gas resource underlie the City such that the Bans will have minimum economic effect on the state (City's Response Br. at 74; Intervenors' Response Br. at 32), even if taken as true, does not diminish the state's interest in the uniform application of oil and gas regulation. The necessary corollary to this argument is that a "patchwork" of bans is permissible throughout Colorado so long as they are not imposed by local governments overlying an abundance of oil and gas resources, even though such jurisdictions would feel the impacts of oil and gas development to a much greater extent than the City. No court has analyzed the importance of statewide uniformity of regulation in the preemption context by analyzing the number of instances in which the state regulation is applied

in any particular jurisdiction. The Supreme Court did not consider the number of bicyclists that were affected by the City's ban in *Webb*, how many mining operations were occurring in Summit County in *Colorado Mining Ass'n*, how many unrelated sex offenders were in need of foster care services within the City of Northglenn in *Ibarra*, or the amount of oil and gas resources impacted in Greeley or La Plata County in *Voss* or *Bowen/Edwards*.

Employing the Defendants' novel approach to preemption analysis would require Colorado courts to engage in a separate assessment of the state versus local interest for each of the more than 200 statutory and home-rule municipalities in Colorado, presumably based on the amount of oil and gas resources underlying the local jurisdiction. As demonstrated above, Colorado courts have consistently avoided this unworkable approach and instead base their preemption analysis, without need for an evidentiary hearing, on the extent to which the state regulatory regime exists to operate on a uniform statewide basis to fulfill its legislative mandate.

5. As a matter of law, the City's Bans have extraterritorial impact.

The City's reliance on horizontal drilling as curing extraterritorial effects of the Bans fails. City's Response Br. at 71–72. The Charter Amendment makes it unlawful to engage in the use, storage, and disposal of hydraulic fracturing fluids in oil and gas operations within the City. Here, the City has banned the hydraulic fracturing of any portion of the wellbore that is in the City, which has affected Synergy this year (*see supra* § 4), while the state authorizes and regulates the hydraulic fracturing of the wellbore outside of the City's limits. What the City's Bans also do is force other jurisdictions to incur the effects of well drilling while insulating the City from those same impacts and cause operators to waste natural resources by leaving them in the ground, which in turn subjects operators to a claim from mineral owners that the it breached

the implied covenant of reasonable development.[11] Further, the Charter Amendment prohibits the storage and disposal of waste in the City, which reveals another extraterritorial impact of the Bans.

Additionally, as with the uniformity element, *Voss* has already decided this extraterritorial impact exists as a matter of law in favor of the state. In *Voss*, the Court held that Greeley's total drilling ban had an extraterritorial effect because it "can result" in increased production costs, which would impact the access of nonresident owners of oil and gas with interests in the resource located both within and outside of the City to obtain an equitable share of production. 830 P.2d at 1067–68. This has already occurred in the context of the Bans to Synergy. *See supra* § 4.

Further, the City's Bans have had a "ripple effect" with other jurisdictions that have adopted or may adopt in the future similar ordinances. *Webb*, 295 P.3d at 491 (Black Hawk's ordinance may lead to other municipal bicycle bans by local communities); *Ibarra*, 62 P.3d at 161–62 (ripple effect compounded by the fact that other municipalities have similar ordinances that limit the number of unrelated sex-offender foster care children residing in one home). As the Court is well aware, other jurisdictions along Colorado's Front Range (Boulder, Boulder County, Fort Collins, Broomfield, and Lafayette) have adopted similar bans and moratoria on oil and gas

[11] *Davis*, 808 P.2d at 360 ("The fundamental purpose of an oil and gas lease is to provide for the exploration, development, production, and operation of the property for the mutual benefit of the lessor and lessee . . .") & 361 ("the implied covenants in an oil and gas lease [are] 'to drill, to develop after discovery of oil or gas in paying quantities, to operate diligently and prudently[,] and to protect the leased premises against drainage.'") (quoting *Mountain States Oil v. Sandoval*, 125 P.2d 964, 967 (Colo. 1942)); *see also* Phillip D. Barber, *The Implied Covenants*, *in* 1B COLO. PRAC., METHODS OF PRACTICE § 13:6 (6th ed. 2014) ("The implied covenant of reasonable development protects the lessor's expectation that upon finding exploitable resources, the lessee will develop those resources for the mutual benefit of both parties if the well would generate sufficient revenue to cover the cost of development and return a reasonable profit.").

operations, specifically banning hydraulic fracturing. The compounding of this ripple effect confirms that the City's Charter Amendment has had and logically will have additional extraterritorial effect. This "ripple effect" has commenced to result in a "patchwork" of local regulations banning the use, storage and disposal of hydraulic fracturing fluids that the Court warned against in *Webb*. 295 P.3d at 491.

6. Only the State has a tradition of regulating the completion of wells.

The City claims that it has regulated hydraulic fracturing of oil and gas wells since the Bans came into effect, while the Commission has never regulated hydraulic fracturing. City's Response Br. at 73. Thus, the City concludes that it has regulated hydraulic fracturing longer than the state, so this factor weighs in its favor. *Id*. However, this argument fails for two reasons.

First, the Commission allows, authorizes, and regulates the completion, including hydraulic fracturing, of wells. *See supra* § 2. Even assuming *arguendo* the state does not regulate hydraulic fracturing because it does not provide a "permit to frac," decisions of an agency not to prohibit hydraulic fracturing carry as much weight as the opposite decision. *See Ark. Elec. Coop. Corp*., 461 U.S. at 384. Moreover, the City's Bans are not land-use regulations—they are negative prohibitions. *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 519, 522 (1992). Because the City's Bans are not land-use regulations, the City has never "regulated" hydraulic fracturing.

There are no facts in dispute that the state has a history since the 1970s of allowing, authorizing, and regulating the drilling and completion of oil and gas wells including the use, disposal and storage of hydraulic fracturing fluids. As the City has no tradition of regulating hydraulic fracturing of oil and gas wells, this factor favors the state.

C. THE CITY MISCONSTRUES THE APPLICATION OF THE OPERATIONAL CONFLICT TEST.

The City incorrectly argues that Plaintiffs must prove an operational conflict of the sort described in *Bowen/Edwards*. Response Br. at 38. Further, the City mistakenly relies upon the operational conflict standard employed in *Bowen/Edwards* in arguing that its Bans can somehow be "harmonized" with and do not "materially impede" or destroy the state's comprehensive regulations allowing and regulating oil and gas operations. City's Response Br. at 82–83. Colorado courts, however, have not employed this construction of the operational conflict test in circumstances where a home-rule municipality completely bans an activity regulated by the state, as discussed below.

In contrast to the ban in *Voss*, *Bowen/Edwards* involved La Plata County's adoption of a regulatory scheme that required oil and gas operators to obtain county permits and comply with certain performance standards. In finding that the state interest in oil and gas does not impliedly preempt "all aspects" of a county's land-use authority over oil and gas operations, the Court held that, outside of areas involving technical conditions on drilling or pumping or safety or land restoration requirements, a local government could regulate oil and gas operations unless its regulations operationally conflicted with state requirements. 830 P.2d at 1060.

As the Supreme Court's own distinctions between the *Voss* and *Bowen/Edwards* cases therein reveal, Colorado courts have applied the *Bowen/Edwards* operational conflict test in the context of evaluating whether particular regulations and standards interfere with or, conversely, can be harmonized with state requirements covering the same conduct.[12] *See Town of Frederick*,

[12] It is only in this context of comparing two competing sets of regulations that *Bowen/Edwards* requires a fully developed evidentiary record. *Bowen/Edwards*, 830 P.2d at 1060. And even in that circumstance, the required record involves an "appropriate pleading" specifying "those

60 P.3d at 763–64 (invalidating town ordinances imposing setback, noise and visual impact requirements on oil and gas wells as conflicting with the detailed requirements of the Commission rules); *BDS Int'l*, 159 P.3d at 779 (applying operational conflict test to void county's oil and gas regulations regarding financial requirements and access to records). Contrary to the City's suggestion, the Charter Amendment does not merely impose land-use or other specific regulations like the setbacks, performance standards, or monitoring requirements addressed in *Bowen/Edwards*. When analyzing home-rule government regulations that, like the Charter Amendment, ban oil and gas technical activities, Colorado courts have looked instead to whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes in matters of mixed state and local interest. *See supra* § III.B.2.

Nonetheless, even if the *Bowen/Edwards* operational conflict test did apply in this case, the Court would be compelled to invalidate the Charter Amendment. As the Court stated in *Bowen/Edwards*:

> State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the State interest. *National Advertising*, 751 P.2d at 636. Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest. *Id.*

830 P.2d at 1059; *accord Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 519 P.2d 834, 836 (Colo. 1973) (conflict exists where local ordinance "proscribes, burdens or limits that which the statute authorizes"). It is only where local regulation can be "harmonized" with and not "materially impede" State requirements that it may survive. *Bowen/Edwards*, 830 P.2d at 1060.

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particular [local government] regulations which it claims are operationally in conflict with, and thus preempted by, the state statutory or regulatory scheme applicable to oil and gas development and operations." *Id.* Nothing more is required.

There is simply no way to harmonize the Charter Amendment, which flatly prohibits oil and gas hydraulic fracturing activity within the City, with the State laws that explicitly allow it to occur and encourages its responsible use, storage and disposal. *See* COGA's Summ. J. Br. at 12–15.

Additionally, the Charter Amendment fails the operational conflict test in *Bowen/Edwards* because it regulates, through its Bans, "technical" aspects of oil and gas operations; *i.e.*, the use of hydraulic fracturing fluids in the completion of a well, and its storage and disposal. Colorado courts have recognized that the Commission has exclusive authority to regulate the technical aspects of oil and gas operations, and that local regulations of such matters are preempted because they irreconcilably conflict with the Commission's authority and regulations. *BDS Int'l*, 159 P.3d at 779–80 ("a county may not impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed by state law or regulation.") (citing *Bowen/Edwards*); *Town of Frederick*, 60 P. 3d at 764 (distinguishing between provisions of ordinance that regulate technical aspects of drilling, and which are therefore necessarily preempted, and other non-technical provisions that are subject to an "operational conflicts" analysis). Because the Charter Amendment bans the use, storage, and disposal of hydraulic fracturing fluids altogether, which completion technology and activity undoubtedly qualifies as a technical aspect of oil and gas extraction, the Charter Amendment is preempted by the Commission's exclusive authority over such matters.

D. THE CHARTER AMENDMENT IS IMPLIEDLY PREEMPTED.

As COGA explained in its Summary Judgment Brief, the holding in *Voss* could not be clearer:

> We conclude that the state's interest in efficient oil and gas development production throughout the state, as manifested in the

> Oil and Gas Conservation Act, is *sufficiently dominant* to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon well within the city limits.

832 P.2d at 1068 (emphasis added). Subsequently, in *Colorado Mining Ass'n*, the Supreme Court confirmed that, in *Voss*, "We held that the state interest manifested in the state act was 'sufficiently dominant' to override the local ordinance." 199 P.3d at 724. The Court then clarified that this sufficient dominancy test, as articulated in *Voss* and *Ibarra*, "is one of several grounds for implied state preemption of a local ordinance." *Id.*[13]

The City argues that by relying on implied preemption, the Plaintiffs are trying to "shortcut the operational conflict analysis *Bowen/Edwards* requires" and that Rule 201 supposedly requires. City's Response Br. at 42 & 52. In arguing that the Bans are not preempted, the City relies on the Court's pronouncement in *Bowen/Edwards* that the Conservation Act does not preempt "all aspects" of a home-rule municipality's land-use authority. *Id*. The *Voss* Court addressed this very issue, and made clear that its contemporary decision in *Bowen/Edwards* did not resolve the issue of whether a home-rule city could ban oil and gas operations:

> There is no question that the city of Greeley has an interest in land-use control within its municipal borders. It is also settled, as evidenced by our decision in *Bowen/Edwards,* that nothing in the Oil and Gas Conservation Act manifests a legislative intent to expressly or impliedly preempt all aspects of a local government's land-use authority over land that might be subject to oil and gas development and operations within the boundaries of a local government. *See Bowen/Edwards,* 830 P.2d at 1059. To say as much, however, is not to imply that Greeley may totally ban the drilling of any oil, gas, or hydrocarbon well within the city.

Voss, 830 P.2d at 1066 (emphasis added).

[13] The City's argument that *Voss* is not an implied preemption case (Response Br. at 62) fails for this reason—the Colorado Supreme Court has explicitly rejected it.

The *Voss* Court then drew a clear distinction between local ordinances that regulate "various [land-use] aspects of oil and gas development and operations" and those that impose a ban:

> If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect. . . . We hold that the state's interest in efficient development and production of oil and gas in a manner preventative of waste and protective of the correlative rights of common-source owners and producers to a fair share of production profits preempts a home-rule city from totally excluding all drilling operations within the city limits.

Id. at 1068–69 (emphasis added); *accord Colo. Mining Ass'n*, 199 P.3d at 724 ("*Voss* is the flipside of *Bowen/Edwards*.").

The City's Bans go to the heart of the state's "sufficiently dominant" interest in promoting efficiency and avoiding waste of these valuable mineral resources. *See Voss* 830 P.2d at 1067; *see also* COLO. REV. STAT. § 34-60-102(1) (protect against waste); §§ 34-60-103(11) & (12) (defining waste to include the unreasonable diminishment of quantities of oil and gas that can be produced) & § 34-60-107 (absolutely prohibiting waste of oil and gas). Accordingly, the Charter Amendment is impliedly preempted.

IV. CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court grant summary judgment in its favor declaring that the City's ban on the use of hydraulic fracturing fluids and techniques to complete hydrocarbon wells and its bans on the use of open pits to store hydraulic fracturing waste and on the disposal of such waste in the City, all as contained in Article XVI of

the Longmont Municipal Home-Rule Charter, are preempted and, thus, invalid and unenforceable.

Dated this 24th day of June, 2014.

Respectfully submitted,

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Original signature on file in the offices of Beatty & Wozniak, P.C.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of June, 2014, a true and correct copy of the foregoing **COLORADO OIL & GAS ASSOCIATION'S COMBINED REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** was served via ICCES, on:

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